Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

77-804

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

HEINRICH JOACHIM,

Petitioner,

—against—

URSULA H. JOACHIM,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK.

Petitioner, Heinrich Joachim, respectfully prays that a writ of certiorari issue to review a determination and order by the Appellate Division, Second Department, of the Supreme Court of the State of New York, entered in that court on April 4, 1977 (Joachim v. Joachim, 57 A D 2d 546). The determination sought to be reviewed is:

"We hold that the Social Security payments to plaintiff[the mother] for the benefit of the child do not relieve defendant [the insured father] even pro tanto, from his obligation to pay for the support of his child [under the divorce decree] in the absence of a showing of financial inability...There is thus no need for a declaratory judgment."

JURISDICTION

(1). This petition is submitted under 28 U.S.C. (Judiciary and Judicial Procedure) 1257(3), (June 25, 1948, c. 646, 62 Stat.929).

Petitioner claims a right under a statute of the United States, to wit, the Social Security Act, Section 202(d)(1), 42 U.S.C. 402(d)(1) (page 12 infra).

Finality

(2). The judgment sought to be reviewed (as to the part arising under the Social Security Act) has been rendered by the highest court of the State of New York possessed of jurisdiction in the premises.

The proceeding which resulted in the above holding and order was initiated in

the New York Supreme Court, in Westchester County -- the court in which the divorce judgment had been rendered. An appeal from the negative order of that court was duly taken to the Appellate Division of the Supreme Court, Second Department. The above quoted holding and order followed. Petitioner then made a timely application to that court for leave to appeal to the Court of Appeals the determination quoted at pages 1-2 supra. He did so in accordance with the applicable provisions of the New York Civil Practice Act and Rules §5602.(a)1.(i) and 5602.(b)1. That application was denied by an order dated May 12, 1977; a copy of that order appears at pages 26-7 infra.

Thereafter, Petitioner, within the time prescribed by CPLR 5514(a), filed a timely notice of appeal to the Court of Appeals; and petitioner duly perfected that appeal. The Court of Appeals, however, sua sponte,

dismissed it*"upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution (Matter of Dougherty v. Makowski, 41 N Y 2d 899)". An official copy of the order (with the court's seal affixed)being submitted;(copy,p.25 infra).

The Constitution thus referred to is that of the State of New York. The applicable provisions thereof are in article VI, section 3. The text thereof is reproduced at pages 21-2 infra. Also reproduced at pages 23-4 infra are the pertinent sections of the New York Civil Practice Law and Rules.

Under the constitutional and statutory provisions referred to above, an appeal to the Court of Appeals was not available (either directly or by application to it for leave to appeal) unless the Appellate Division's determination and order are "final" within the meaning of that term,

* On September 13, 1977

as construed by decisions of the Court of Appeals. In serving his notice of appeal to the Court of Appeals, Petitioner relied on a number of cases in which post-judgment determinations were held to be final judgments (Matter of Hui (Furman), 20 N Y 2d 568, 571, m. for reargument denied 21 N Y 2d 880; People v. Scanlon, 11 N Y 2d 459; Humbeutel v. Humbeutel, 305 N.Y. 159; S.J.E. Building Corp. v. Matt O.M. Construction Company, 265 N.Y. 282; Hansen v. City of New York, 299 N.Y. 136; Livingston v. Livingston, 173 N.Y. 377; Wetmore v. Wetmore, 162 N.Y. 503).

Whatever may be the legalistic distinction between (a) the cases which, as noted above, were relied on by petitioner and (b) Dougherty v. Makowski, cited in the order of dismissal, and Friendly Ice Cream Corp. v. Great Eastern Mall, 39 N Y 2d 1032, cited in Dougherty v. Makowski, factually, the result is that the Appellate Division's

determination which is quoted at page 2 supra is final and binding upon the parties beyond review by any state court.

In those circumstances, the determination is final within the meaning of 28 U.S.C. 1257(3) (Richfield Oil Corp. v. State Board, 329 U.S. 69, 72-4 (1946); and cases cited therein; American Railway Express Co. v. Levee, 263 U.S. 19, 20-21 (1923); Stratton v. Stratton, 239 U.S. 55)[1].

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1 In Richfield, supra, this Court said (at pp. 22-3, emphasis added):

"The designation given the judgment by state practice is not controlling... The question is whether it can be said that 'there is nothing more to be decided'..., that there has been 'an effective determination of the litigation'...

...Although the Supreme Court [of California] reversed the judgment of the trial court without direction, its decision controls the disposition of the case...there is nothing more to be decided" (pages 72-3).

The Federal Question

(1). It seems self-evident that the nature and effect of payments under the Social Security Act to persons insured thereunder and for dependents of such insured are questions of federal law -- what is involved here is the construction of an act of Congress (cf. Rawlings v. Ray, supra, 312 U.S. 96, 98 (1941); Angel v. Bullington, 330 U.S. 183, 188-9 (1946)[2]; Fisher v. Wharton, 317 U.S. 217, 220-1 (1942); Richfield Oil Corp. v. State Board, supra, 329 U.S. 69, 74-5).

(2). From the inception of the Social Security payments, Petitioner has consistently maintained that the checks for the support of his child were payments for his benefit.

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2 Indeed, "...whether the claims are based on a federal right or are merely of local concern is itself a federal question" (Angel v. Bullington, supra, at p. 189).

When that position was challenged by his divorced wife, Petitioner moved in the court which had rendered the divorce decree (the Supreme Court of the State of New York, County of Westchester), by a notice dated April 9, 1976, "for an order declaring that the amount of the Social Security check which the plaintiff [respondent herein] received on or about March 4, 1976 pursuant to a Social Security award to defendant [petitioner]....and all such payments received in the future, shall be deemed payments by the defendant [petitioner] for the support of his minor child pursuant to, and in pro-tanto compliance with, the provisions of the judgment entered on December 2, 1974 as modified by the decision and order of the Appellate Division entered in June, 1975,.." (Record on Appeal in the Court of Appeals at page 37-8 . A copy of that Record is respectfully submitted for verification of the quotations;it is hereinafter

referred to as R on A.)

In the supporting affidavit, Petitioner Joachim stated, inter-alia: "...As I was approaching the age of 65 years (which I would reach on September 26, 1975) and my professional earnings were diminishing, I, in July, 1975, filed an application for such benefits as I was entitled to under the Social Security Laws for myself and my 11 year old dependent child Angela, who, under the terms of the judgment, was living with her mother, the plaintiff" (R on A at p. 40).

Counsel for Mr. Joachim in a supporting statement, stated: "It seems self-evident that Social Security checks for the support of a child of an insured under the Social Security System (which normally would go to that insured) is a payment for his account when it is sent to the person who has custody of the child under a judicial decree... [T]he present motion is not for a modification of the support provisions..." (R on A p.4

In a "reply affirmation" counsel repeated:

> "...this is not an application for a modification of the judgment or any provision thereof."

And added:

> "The sole question is whether the Social Security payments for the support of the child which result from defendant's Social Security insurance and his diminished earnings should be deemed the equivalent of payments by him for his account" (R on A p. 49).

In opposition, Mrs. Joachim pleaded that since "the motion is not an application for a modification of the support provisions", it is not "within the purview of section 236 DRL [The New York Domestic Relations Law]..." (R on A p. 24).

The court so ruled (R on A p. 23):

> "The court determines there are no provisions of the Domestic Relations Law which would permit the relief herein sough by way of motion" (id).

Petitioner then followed the advice of counsel to discontinue the weekly payments of $35 on the ground that the amounts paid by the Social Security Administration approx-

imately equalled the $35 per week, with a promise to "make up the shortages if and when they occur". Mrs. Joachim brought a proceeding to adjudicate Mr. Joachim in contempt of court for non-payment of the child support ordered by the divorce decree (R on A pp. 6-7). Mr. Joachim, in substance, interposed the defense that the Social Security payments constituted payment by him (R on A pp. 34-36).

For example, in paragraphs 16-17 on pages 35-6, Mr. Joachim stated as follows:

> "I believe that my attorney has been correct in advising me that in respect to the support of the child I should be credited with the Social Security payments received by the plaintiff for the child's support. If the child were living with me I would be receiving the checks for her support. Those checks are the product of the contributions which I and my employers have made to the Social Security Administration to my account...The payments are my earnings..."

In the brief to the Appellate Division, Point I was headed in part:

> "...The Defendant is Entitled to be Credited With the Social Security Payments Which Plaintiff Received For the Child's Support."

That was reiterated in Point III and in the argument thereunder.

THE PERTINENT PROVISIONS OF THE SOCIAL SECURITY ACT

Section 202(d)(1), 42 U.S.C. (402(d)(1), provides in pertinent part:

> "Every child (as defined in section 416(e)[3] of this title) of an individual entitled to old age or disability insurance benefits...if such child--
>
> .....
>
> (C) was dependent upon such individual
>
> .....
>
> shall be entitled to a child's insurance benefit...
>
> .....
>
> (2) Such child's insurance benefit for each month shall, if the individual on the basis of whose wages and self-employment income the child is entitled to such benefit has not died prior to the end of such month, be equal to half of the primary insurance amount of such individual for such month..."

---

3 28 U.S.C. 202(e).

THE CASE; THE ISSUE

A divorce decree rendered in November 1973, as modified by the New York Appellate Division of the Supreme Court, Second Department (Joachim v. Joachim, 48 A D 2d 855), requires petitioner as the father of an infant to pay respondent mother, for the support of his child (who, pursuant to the decree, lives with the mother), $35 per week. In July 1975, on the eve of his retirement, the father as an insured under the Social Security System, applied for and subsequently received, and is receiving, Social Security benefits for himself and his dependent child; the amounts of the latter are paid directly to the mother with whom the child lives. The question at issue is:

> Is the father entitled to be credited with the child support Social Security payments as payments for his account in pro tanto discharge of the $35 per week fixed by the decree as his obligation for the support of the child?

The "Opinion and Decision slip" incorporated by reference in the order of the

Appellate Division says no (Joachim v. Joachim, 57 A D 2d 546; infra pp. 30-33). The whole of the relevant portion of the opinion, (including the excerpt on page supra) is:

> "We hold that the Social Security payments to plaintiff[the mother] for the benefit of the child do not relieve defendant [the insured father] even pro tanto, from his obligation to pay for the support of his child [under the divorce decree] in the absence of a showing of financial inability (cf. Matter of Quat v. Freed, 25 N Y 2d 645, 646; Beardsley v. Hotchkiss, 96 N.Y. 201, 219-220; Siegel v. Hodges, 15 A D 2d 571, 572). There is thus no need for a declaratory judgment to this effect...He [the father] may,.if he be so advised, apply for a reduction in child support payments. On such application the fact that plaintiff [the mother] is receiving Social Security payments for the child, may be considered by the court along with other relevant circumstances, in determining the proper amount to be allowed for child support."4

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4 The whole of the opinion is reproduced at pages 30-33 infra. None of the three cases cited in the above quotation is in point (see p. 19 infra).

Petitioner respectfully urges that the State court has misconceived the nature and effect of the child support payments under the Social Security Act.

THE GROUNDS OF THIS APPLICATION

1. The point that was raised by Petitioner in the State courts and which is presented by this petition has not been heretofore determined by this Court. Indeed, it seems not to have been previously ruled on in any jurisdiction. There are, however, several decisions, including one by this Court, which recognize that Social Security payments for dependents are a benefit which inures to the benefit of the insured (see pages 16-17 infra) and thus tend to indicate that the State court decision herein is erroneous.

2. The point, it seems clear, is of substantial importance to the proper functioning of the Social Security System.

Manifestly,the primary purpose of the Act

is to provide for the economic welare of the wage earner when he becomes disabled or retires from employment. That concern includes the insured's dependents. Hence, formulas are prescribed for coverage of both the insured and his dependents.

In accordance with those formulas, Petitioner, at the time of the institution of the contempt proceeding against him, was receiving for his own use $285.40 per month and, for the support of his dependent daughter, was allotted $148.89 per month. Clearly, the purpose of that supplement was to supply the necessary means for the support of the child, to thus fulfill the insured father's duty to the child and relieve the insured of the burden of her support. That is the effect when the supplement is paid to the insured (and the amount is adequate). That would be the effect on the insured in this case if the supplement for the child were paid to the insured and was turned over

by him to the person with whom the child lives. Why should the effect be different when the supplement is paid directly to the person in charge of the child?

As noted above, there are several helpful pertinent cases.

In Hopkins v. Cohen, 390 U.S. 530 (1968), this Court held:

> "proof of the husband's [the insured's] 'claim' results in a package of benefits to his immediate family; and those benefits inure to the benefit of the head of the family who files the 'claim'" (at p. 534; emphasis added).

In Schmiedigen v. Celebrezze, 254 F. Sup. 825 (U.S.D.C., D. of C. 1965), in determining a widow's rights, the court observed (at p. 827):

> "In dealing with Old Age Insurance provisions of the Social Security Act, it must be borne in mind that...the law created a contributory insurance system, under which what in effect constitute premiums are shared by employees and employers. Consequently, in spirit at least, if not strictly and technically, the employee, who throughout his working life has contributed part of the premiums in the form of deductions from his wages or salary,

> should be deemed to have a vested right to the payments prescribed by the statutory scheme, which in effect comprises the terms of his insurance policy. He has earned the benefits;..."

More recently, in Sweeney v. Secretary of Health, Education and Welfare, 379 F. Sup. 1098 (U.S.D.C., E.D.N.Y. 1974), the Court, citing Hopkins v. Cohen, supra, repeated that the benefits for a wife or child "depend on the benefit to which the... claimant is entitled...such benefits are derived from the plaintiff's [that is the insured's] entitlement" (at p. 1102).

The functional reality of Social Security Allotments for the support of dependents was given effect in a recent New York Family Court decision, Carol K. v. Arnold K., 85 Misc 2d 643. In determining the amount to be paid by the father for the support of his children, the Court said:

> "...The monthly insurance payment the children receive because of petitioner's disability must be taken into account, since it is received as a matter of statutory right specifically for their

support needs. (See Winter v. Winter, 39 A D 2d 69, 71, aff'd. 31 N Y 2d 983.)"

3. The cases cited by the Appellate Division (at p.14 supra) are totally inapposite.

In the Matter of Quat v. Freed, 25 N Y 2d 645, and Drazin v. Drazin, 31 A D 2d 531, the trusts were not created by, or contributed to, by the father. Thus, he was in no position to claim credit for payments therefrom.

In Siegel v. Hodges, 15 A D 2d 571, the infant had "an estate of his own" which the court held did not relieve the father from the duty to support his child.

In Beardsley v. Hotchkiss, 96 N.Y. 201, creditors of a father sought to recoup from his children the expenditures he had made for their support, which the creditors claimed were excessive.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari issue as hereinabove in-

dicated, and for such other and further relief as the Court may deem appropriate.

December 4 , 1977.

Respectfully Submitted,

Copal Mintz

COPAL MINTZ
Counsel for Petitioner

§ 3. [Court of appeals; subject matter jurisdiction.]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him.

(4) From a determination of the appellate division of the supreme court in any department, other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding where the appeal to the appellate division was from a judgment or order entered in an appeal from another court, including an appellate or special term of the supreme court, unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

(8) The legislature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases specified in paragraph (1) of this subdivision wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by paragraph (6) of this subdivision.

CIVIL PRACTICE LAW AND RULES
OF THE STATE OF NEW YORK

§ 5601. Appeals to the court of appeals as of right.

(a) Dissent, reversal or modification. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon non-final determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance or from a final determination of an administrative agency, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment or determination and which satisfies the requirements or subdivision (a) or of paragraph one of subdivision (b) except that of finality.

BEST COPY AVAILABLE

CIVIL PRACTICE LAW AND RULES
OF THE STATE OF NEW YORK

§ 5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

ORDER DISMISSING APPEAL

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at the Court of Appeals Hall in the City of Albany on the thirteenth day of September A.D. 1977

PRESENT, HON. CHARLES D. BREITEL, Chief Judge, presiding.

---

2 Mo. No. 866 SSD 69

Ursula H. Joachim,
Respondent,
vs.
Heinrich Joachim,
Appellant.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that the order appealed from does not finally determine the action within the meaning of the Constitution (Matter of Dougherty v. Makowski, 41 N Y 2d 899).

(Seal) /s/ Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court.

ORDER OF APPELLATE DIVISION
DENYING LEAVE TO APPEAL TO
COURT OF APPEALS

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 12, 1977

HON. JAMES D. HOPKINS, Justice Presiding
HON. HENRY J. LATHAM)
HON. VINCENT D. DAMIANI) Associate Justices
HON. SAMUEL RABIN)

Ursula H. Joachim,
Respondent,
v.
Heinrich Joachim,
Appellant.

Order on Motion to Appeal to the Court of Appeals

In the above entitled cause, the above named appellant having moved to reargue the appeal or for leave to appeal to the Court of Appeals from an order of this court, dated April 4, 1977, which determined an appeal from an order of the Supreme Court, Westchester County, dated August 17, 1976;

A.D. ORDER DENYING LEAVE TO APPEAL TO COURT OF APPEALS (cont'd)

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

ORDER OF THE APPELLATE DIVISION SOUGHT TO BE REVIEWED.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 4, 1977.

HON. JAMES D. HOPKINS, Acting Presiding Justice.
HON. HENRY J. LATHAM)
HON. VINCENT D. DAMIANI,)Associate
HON. SAMUEL RABIN,) Justices

Ursula H. Joachim,

Respondent,

v.

Heinrich Joachim,

Appellant.

ORDER ON APPEAL FROM ORDER

In the above entitled cause, the above named Heinrich Joachim, defendant, having appealed to this court from so much of an order of the Supreme Court, Westchester County, dated August 17, 1976, as, in denying the plaintiff's motion to hold him in contempt for his failure to pay child support, (1) determined that

ORDER OF THE APPELLATE DIVISION
(cont'd.)

the proper means of resolving the issue raised by his opposition to the plaintiff's motion was an action for a declaratory judgment, (2) directed him to commence such an action within 30 days and (3) granted the plaintiff leave to renew should he fail to commence such an action; and the said appeal having been submitted by Copal Mintz, Esq., of counsel for the appellant, and submitted by Martin J. Rosen, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof* it is:

ORDERED that the order insofar as appealed from is hereby unanimously reversed, on the law, without costs or disbursements, and the application to hold defendant in contempt denied outright.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

* emphasis added

APPELLATE DIVISION'S OPINION

57 AD2d 546 B/ms
S - February 24, 1977
465 E

Ursula H. Joachim, respondent
v. Heinrich Joachim,appellant.

Copal Mintz, New York,N.Y. for appellant.

Martin J. Rosen, P.C., White Plains, N.Y. for respondent.

In a matrimonial action, the defendant appeals from so much of an order of the Supreme Court, Westchester County, dated August 17, 1976, as, in denying the plaintiff's motion to hold him in contempt for his failure to pay child support, (1) determined that the proper means of resolving the issue raised by his opposition to the plaintiff's motion was an action for a declaratory judgment, (2) directed him to commence such an action within 30 days and (3) granted the plaintiff leave to renew should he fail to commence such an action.

Order reversed insofar as appealed from, on the law, without costs or disbursements, and application to hold defendant in contempt denied outright.

A.D. OPINION (cont'd.)

Plaintiff's judgment of divorce from defendant, as modified on appeal (Joachim v. Joachim, 48 AD2d 855), awarded her alimony, custody of their minor daughter and $35 per week for support of the child.

The defendant subsequently applied for and received Social Security benefits, with the result that plaintiff receives monthly Social Security payments (which now equal $35 per week) for the benefit of the child. On the advice of Counsel the defendant continued to pay plaintiff alimony but stopped paying child support.

The plaintiff moved to punish him for contempt for his failure to make eight specified child support payments, and he opposed the motion on the ground that the Social Security payments constituted child support and relieved him, pro tanto, from his obligation to pay for his daughter's support.

A.D. OPINION (cont'd.)

The court at Special Term found that a prior unappealed order of another Justice at Special Term was the law of the case and established that the proper means for adjudicating defendant's claim was by a declaratory judgment. The court also found that defendant's default was not willful and denied the motion to punish him for contempt. However, it directed him to commence an action for a declaratory judgment within 30 days, failing which plaintiff was granted leave to renew her application.

Under the facts disclosed, the doctrine of the law of the case does not apply, and even if it did, it would not be binding on this court as an appellate tribunal (see Walker v. Gerli, 257 App. Div. 249, 251-252). We hold that the Social Security payments to plaintiff for the benefit of the child do not relieve defendant, even pro tanto, from his obligation to pay for the support of his child in the absence of a showing of financial inability (cf. Matter of Quat

A.D. OPINION (cont'd.)

v Freed, 25 NY2d 645, 646; Beardsley v. Hotchkiss, 96 NY 201, 219-220; Siegel v Hodges, 15 AD2d 571, 572). There is thus no need for a declaratory judgment to this effect and, since the record supports the finding that the defendant's default was not willful, the motion to punish him for contempt should have been denied without qualification. He may, if he be so advised, apply for a reduction in child support payments. On such an application the fact that plaintiff is receiving Social Security payments for the child may be considered by the court, along with other relevant circumstances, in determining the proper amount to be allowed for child support.

HOPKINS, Acting P.J., LATHAM, DAMIANI and RABIN, JJ., concur.

ORDER REVERSED BY THE APPELLATE DIVISION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

- -X

URSULA H. JOACHIM,

Plaintiff,

-against-

HEINRICH JOACHIM,

Defendant.

- X

SLIFKIN, J.

By order to show cause, plaintiff moves to punish defendant for contempt for failure to pay $280 child support as required by the judgment of divorce and for counsel fees in connection with the application.

Defendant opposes and asserts that he is entitled to credit towards child support of the monies paid by the Social Security Administration to plaintiff for the child's care. On a prior motion by defendant for an order declaring that the defendant was entitled to a credit for the Social Security check against the child support provisions of the judgment of divorce, Judge Jiudice held that

ORDER REVERSED BY THE A.D.
(cont'd)

the remedy available to defendant would be an action for a declaratory judgment and not solely by motion of restricted nature as made herein.

Defendant has not commenced an action for a declaratory judgment, but again merely alleges in opposition to the instant application for a contempt order that he may take credit against his child support obligations from the social security payments.

While the court is not unsympathetic to the claims advanced by defendant, the fact remains that Judge Jiudice has determined that the proper means for determining an adjudication of his claim is by means of a declaratory judgment. Said order has not been appealed and thus, it is the law of the case which may not be overruled by this court. Accordingly, this court will not pass on defendant's claim in its present form.

ORDER REVERSED BY THE A.D.
(cont'd.)

The court will not hold defendant in contempt since on the papers herein, it may not conclude that there has been a willful failure to comply with the child support provisions. However, the court directs that defendant commence a declaratory judgment within thirty (30) days. If he fails to do so, plaintiff is granted leave to renew this application.

The court further notes that counsel fees are not awarded on an application such as this without an affidavit of counsel as to the services rendered.

So Ordered.

Dated: White Plains, New York
August 17, 1976

/s/ Morrie Slifkin
MORRIE SLIFKIN
J. S. C.

MARTIN J. ROSEN,ESQ.,
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COPAL MINTZ, ESQ., Of Counsel

ORDER DATED APRIL 29, 1976

SUPREME COURT-STATE OF NEW YORK

TRIAL/SPECIAL TERM, PART WESTCHESTER COUNTY

PRESENT:

HON. JOSEPH JIUDICE,
Justice.

URSULA H. JOACHIM,

Plaintiff,

-against-

HEINRICH JOACHIM,

Defendant

The following papers numbered 1 to 5 read on this motion by defendant for an order declaring the amount of a Social Security check to the plaintiff for the support of the parties' child in her custody and all future Social Security payments to the plaintiff for the support of the child shall be deemed payments by the defendant in pro tanto compliance with the provisions of a previous modified judgment fixing the defendant's liability for support.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause - affidavits	1,2
Answering affidavits	3
Replying affidavits	4
Exhibits	5

ORDER DATED APRIL 29, 1976
(Cont'd.)

Upon the foregoing papers it is ordered that this motion is determined in the following manner. The defendant acknowledges he is not moving for a modification pursuant to §236 of the Domestic Relations Law. This Court determines there are no provisions of the Domestic Relations Law which would permit the relief herein sought by way of motion.

It may be the defendant has a remedy by way of declaratory judgment; however, the issue presented herein is not properly before this Court on a motion. Defendant's motion is denied.

Dated APRIL 29, 1976.

JOSEPH JIUDICE
J.S.C.